86-1938

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL U. DEMPSEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the opinion of the Court of Appeals for the Seventh Circuit requiring the petitioner, who claims double jeopardy based on more than one federal criminal conspiracy prosecution, to bear the burden of proving that the separate conspiracy prosecutions are for the same offense in law and fact is in conflict with the rulings of the majority of other Circuit Courts of appeal which impose the burden of proof upon the government in such circumstances.

PARTIES TO THE PROCEEDING BELOW

Petitioner, Michael U. Dempsey, and co-defendants Steven L. Antonacci, Roy Slater, Merle Slater, Larry J. Bowen, Larry Carl Davis, John A. Underwood, George Spann, John H. Newsome, Martin R. Payeur, Robert C. Steeples, David R. Bullock, Gary A. Brown, and Jeffrey M. Duke, as well as the United States of America, were the parties to the proceeding in the courts below.

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PETITION FOR A WRIT OF CERTIORARI UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Michael U. Dempsey, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on November 25, 1986.

OPINION BELOW

The judgment and opinion of the Court of Appeals for the Seventh Circuit, not yet reported, appear in the appendix to this petition. (App. A-1 - A-6)

JURISDICTION

The judgment and opinion of the Court of Appeals for the Seventh Circuit were entered on November 25, 1986. This Petition for Writ of Certiorari was filed within sixty (60) days of

that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 and the decision of this Court in the case of *Abney v. United States,* 431 U.S. 651 (1977).

CONSTITUTIONAL PROVISION INVOLVED

Amendment to the Constitution of the United States of America, V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

In October 1984, petitioner was charged in the Eastern District of Michigan with conspiracy to possess with intent to distribute marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Named as co-conspirators in that case were Ned and Fred Shure, referred to herein as the "Shure Brothers," and "others both known and unknown to the Grand Jury." The period of the conspiracy was alleged to be "on or about January 1974 through December 31, 1982, the exact dates being unknown," and the locations of the conspiracy were alleged to be "the Eastern District of Michigan *and elsewhere."* Specifically with reference to petitioner, it was charged that he "would receive bulk quantities of marijuana from the Shure brothers or employees for purposes of redistribution." (App. A-7 and 8)

In February 1985, petitioner entered a plea of guilty to the conspiracy charged and was sentenced to a term of imprisonment which he has now served. At the time he pled guilty to the indictment in Michigan, petitioner specifically advised the District Court of the extent of his involvement in the conspiracy charged and indicated that his role was to obtain marijuana from the Shure Brothers in Michigan and to distribute it in the vicinity of his home in southern Illinois. (App. A-10 and 11) Specifically, he stated "I made trips to Michigan and picked up the marijuana and took it back to Illinois" for "redistribution and sales" (App. A-10)

Based upon his admissions and representations, the Court accepted petitioner's plea of guilty and sentenced him accordingly.

However, on September 27, 1985, another indictment was returned in the Southern District of Illinois charging petitioner with conspiracy to distribute marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The period of the conspiracy alleged was April 1, 1977 to November 1983. The named co-conspirators are a number of persons residing in Illinois and who were not named in the Michigan indictment. The indictment, however, charges that petitioner conspired with the named co-conspirators and "*others* known and unknown to the Grand Jury," and that the conspiracy took place in the Southern District of Illinois *and elsewhere.* (App. A-12 and 13) There are no overt acts alleged in the Illinois indictment, so it is impossible to determine from the face of the indictment alone what petitioner is alleged to have done and when he is alleged to have done it. Petitioner, however, filed his Motion to Dismiss upon Grounds of Double Jeopardy asserting that the conspiracy charged in the Illinois indictment was but a part of the conspiracy to which he had pled guilty in Michigan. He also filed a Motion to Dismiss the Indictment on grounds of vagueness inasmuch as the indictment is insufficient to protect him from double jeopardy.

In an attempt to clarify this issue, petitioner filed various motions, including a Motion for a Bill of Particulars, Motion to Compel Discovery of Work Product of the United States Attorney and a Motion for Inspection of Grand Jury Transcripts. Each of these motions has reference to petitioner's claim of double jeopardy and sought to obtain information to compare the intended allegations in the Illinois indictment with the allegations and proof which were available in the Michigan case. These motions, however, were denied and the Court set petitioner's double jeopardy motion for hearing on December 9, 1985.

At the hearing, petitioner presented a copy of the indictment in the Michigan District Court together with the judgment and commitment order. (App. A-7 - A-9 and Ex. 1 and 1A) He also presented the transcript of his plea to the indictment in Michigan wherein he indicated the scope of his involvement and his activity in the Southern District of Illinois. (App. A-10 and 11). He also attempted to introduce FBI reports indicating the statements of various witnesses which counsel indicated had been provided as discovery in both the Michigan case and the Illinois case (Ex. 4-9), as well as a statement of one Hatchett detailing petitioner's involvement in Illinois. (Ex. 10) Although it was not disputed that these were, in fact, FBI reports which had been provided to petitioner, admission of the reports was denied. (App. A-15).

Petitioner then produced two witnesses, Jack Barenfanger and Robert Picard, who had been unindicted coconspirators in the Michigan case and through whom it was established that petitioner's role in the Shure conspiracy was one of a customer who would buy marijuana in Michigan for shipment to and redistribution in southern Illinois. (T. 17-30) It was also established that these two individuals were prepared to testify against petitioner in Michigan and that petitioner was aware of the nature of their anticipated testimony at the time he entered his plea of guilty in the Michigan District Court. (T. 20)

Although invited to do so by both government counsel and the Court, petitioner did not testify at the motion hearing. At the conclusion of the hearing, the Court ruled that, in the absence of petitioner's testimony, petitioner *had not sustained his burden* of proving that the two conspiracies charged in the respective indictments were part of the same conspiracy. (App. A-15 and T. 32) Petitioner contended that his was an impossible burden since he did not know the parameters of the government's allegations or the extent of its evidence. He contended that he had made a "non-frivolous" showing that double jeopardy was, indeed, an issue and that, therefore, the burden of proof to show that the conspiracies alleged were separate conspiracies was upon the government. (T. 34, 36)

The District Court, however, rejected petitioner's argument and denied petitioner's Motion to Dismiss Upon Grounds of Double Jeopardy. (App. A-15).

Petitioner then instituted an interlocutory appeal of the District Court's order to the Court of Appeals for the Seventh Circuit, pursuant to this Court's decision in the case of *Abney v. United States,* 431 U.S. 651 (1977).

On November 25, 1985, the Court of Appeals for the Seventh Circuit entered its judgment and opinion affirming the District Court's denial of petitioner's Motion to Dismiss Upon Grounds of Double Jeopardy. (App. A-1 - A-6) Relying upon its previous decision in *United States v. Castro,* 629 F.2d 456, 461 (7th Cir. 1980), wherein it held that, in claiming double jeopardy based on more than one conspiracy prosecution, a defendant bears the burden of establishing that the prosecutions are for the same offense in law and fact, the Court of Appeals for the Seventh Circuit affirmed by concluding that "for purposes of this interlocutory appeal, [petitioner] has failed to establish to our satisfaction that he was involved in only one conspiracy during the time period in question." (App. A-6).

REASON FOR GRANTING THE WRIT

The Opinion Of The Court Of Appeals For The Seventh Circuit Requiring A Defendant, Who Claims Double Jeopardy Based On More Than One Federal Criminal Conspiracy Prosecution, To Bear The Burden Of Proving That The Separate Conspiracy Prosecutions Are For The Same Offense In Law And Fact, Is In Conflict With The Rulings Of The Majority Of Other Circuit Courts Of Appeal Which Impose The Burden Of Proof Upon The Government In Such Circumstances. This Court Should Therefore Grant A Writ Of Certiorari To Resolve This Conflict Of Authority.

The Double Jeopardy Clause of the Fifth Amendment prohibits the government from prosecuting what is essentially one conspiracy as two separate conspiracies. *Braverman v. United States,* 317 U.S. 49, 53 (1942).

In cases where a defendant claims double jeopardy based on more than one federal criminal conspiracy prosecution, a conflict of authority exists within the circuit courts of appeal as to which party must bear the burden of proving that the separate conspiracy prosecutions are for the same offense.

In the Seventh Circuit, the general rule as was applied in the instant case, is that in claiming double jeopardy based on more than one conspiracy prosecution, the defendant bears the burden of establishing that the prosecutions are for the same offense in law and fact. *United States v. Castro,* 629 F.2d 455, 461 (7th Cir. 1980); *United States v. West,* 670 F.2d 675, 681 (7th Cir. 1982); *United States v. Roman,* 728 F.2d 846, 854 (7th Cir. 1984).

In the Second, Third, Fifth, Sixth, Eighth and Ninth Circuits, however, the defendant is required to make only a "non-frivolous" showing that double jeopardy is indeed an issue. Once this is done, the burden of proof is shifted to the government to show that the two prosecutions are actually for separate

offenses. *United States v. Mallah,* 503 F.2d 971, 985-86 (2d Cir. 1974); *United States v. Inmon,* 568 F.2d 326, 329-33 (3rd Cir. 1977); *United States v. Stricklin,* 591 F.2d 1112, 1117-19 (5th Cir. 1979); *United States v. Jabara,* 644 F.2d 574, 576-77 (6th Cir. 1981); *United States v. Thomas,* 759 F.2d 659, 662 (8th Cir. 1985); *United States v. Bendis,* 681 F.2d 561, 566 (9th Cir. 1981).

The rationale for the rule requiring the government to bear the burden of proving separate conspiracies is best explained by Circuit Judge Hill in the *Stricklin* decision, *supra,* 591 F.2d at 1117-1119, and consequently, the opinion is attached hereto as part of the Appendix (App. A-16 - A-37). The following language, however, is particularly pertinent to this case inasmuch as petitioner's prior plea of guilty to the Michigan indictment and the denial of his discovery motions in the District Court below foreclosed his ability to compare the evidence and specific allegations forming the basis of the Michigan indictment with those upon which the Illinois indictment was based:

> The impracticality of placing the burden of persuasion on the defendant in this situation is obvious in light of his lack of access to the proof on which the government proposes to rely and his inability to offer immunity to prospective witnesses (citations omitted) ... Where a prior indictment resulted in a guilty plea or was dismissed, so that there is no record of the evidence supporting the prior indictment, the defendant is even further handicapped. The government is clearly in a better position to show that the crime charged in a previous indictment than the defendant is to show that the crimes are the same. (591 F.2d at 1118)

Further aggravating the situation that confronted the petitioner in the courts below was the District Court's refusal to grant him his requested Bill of Particulars, Motion to Compel Discovery of Work Product and Motion for Inspection of Grand Jury Transcripts. In effect, the petitioner was required

to prove that "Conspiracy A" was the same offense as "Conspiracy B," but was not informed what "Conspiracy B" consisted of. Petitioner was not provided with the names of all known co-conspirators, the specific nature, dates, or locations of any overt acts or any other information necessary to sustain the onerous burden of proof with the courts below required of him. The indictment itself is totally uninformative on these matters.

Although petitioner was made aware in the District Court below of Seventh Circuit authority holding that if he were to testify at the hearing on his double jeopardy claim, his testimony could not be used against him at trial, *United States v. Bounos,* 693 F.2d 38 (7th Cir. 1982), he had not been made aware, by the indictment or otherwise, of the specific conduct he was alleged to have committed. Whether or not the petitioner could have testified at the hearing without waiving his Fifth Amendment rights or subjecting his testimony at the hearing to use by the prosecution does not solve the dilemma with which he was confronted. The fact is that the indictment under which he was charged does not give him sufficient information about the conspiracy actually alleged to meet the "burden of proof" imposed upon him by the courts below. If petitioner were to have testified, he would have done so in a vacuum, not knowing what the specific allegations against him were. It is simply impossible for petitioner to prove that the conspiracy charged in Illinois is part of the conspiracy to which he had pled guilty in Michigan unless he is informed of the parameters of the conspiracy, the overt acts, the alleged co-conspirators, and other details necessary to compare the two prosecutions. This is precisely the problem addressed and answered by the Second, Third, Fifth, Sixth, Eighth and Ninth Circuits in the cases previously cited which resolve this matter by imposing the burden of proof to establish separate conspiracies upon the government.

If petitioner were, indeed, involved in a separate conspiracy in Illinois, it is only the government which is in a position to

demonstrate the differences in the two conspiracies to the Court.

Petitioner clearly made at least a "non-frivolous" showing that double jeopardy was indeed an issue in this case. The transcript of his plea in the Michigan District Court together with the testimony of his accomplices indicate that he was charged with and pled guilty to obtaining marijuana from the Shure Brothers and bringing it to southern Illinois for distribution. He has now served his sentence for that offense. There is little else that petitioner could have said even if he were to have testified. The invitation to testify under whatever protections are afforded by the *Bounos* case was, in effect, a suggestion that he defend himself against allegations and evidence of which he was unaware. Moreover, and most importantly here, the decisions in the courts below, as well as the line of Seventh Circuit cases upon which they are based, are clearly in conflict with decisions in other Circuit Courts of Appeals. The following is a synopsis of the law as stated by the Seventh Circuit compared with that stated in other circuits:

Holdings Of Seventh Circuit Authority	**Holdings Of Authority From Other Circuits**
1. United States v. Dempsey, No. 85-3163 (7th Cir. Nov. 25, 1986) (slip opinion)	*1. United States v. Mullah,* 503 F.2d 971, 986 (2d Cir. 1974)
"In claiming double jeopardy based on more than one conspiracy prosecution, a defendant bears the burden of establishing that the prosecutions are for the same offense in law and fact."	"We think these facts are sufficient to satisfy [defendant's] burden of going forward, of putting his double jeopardy rights in issue. At this point, the burden shifts to the government to rebut the presumption...that [the defendants] were part of the same organization."

2. United States v. Castro, 629 F.2d 456, 461 (7th Cir. 1980)	*2. United States v. Inmon,* 568 F.2d 326, 329-33 (3rd Cir. 1977)
"In claiming double jeopardy based on more than one conspiracy prosecution, a defendant bears the burden of establishing that the prosecutions are for the same offense in law and fact."	"We conclude that when a defendant makes a non-frivolous showing that an indictment charges the same offense as that for which he was formerly placed in jeopardy, the burden of establishing separate crimes — in this case separate conspiracies — is on the government."
3. United States v. West, 670 F.2d 675, 681 (7th Cir. 1982)	*3. United States v. Stricklin,* 591 F.2d 1112, 1117-1119 (5th Cir. 1979)
"A defendant claiming that he has been subjected to double jeopardy bears the burden of establishing that both prosecutions are for the same offense."	"The burden of establishing that the indictments charge separate crimes is most equitably placed on the government when a defendant has made a non-frivolous showing that an indictment charges the same offense as that for which he was formerly placed in jeopardy."
4. United States v. Roman, 728 F.2d 846 (7th Cir. 1984)	*4. United States v. Jabara,* 644 F.2d 574, 576 (6th Cir. 1981)
"A defendant claiming that he has been subjected to double jeopardy bears the burden of establishing that both pro-	"We adopt the conclusion of those cases [where] they found it appropriate for a trial court, confronted with a non-frivo-

secutions are for the same offense."

lous double jeopardy claim, to shift to the government the burden of proving by a preponderance of the evidence that it was not seeking to prosecute the same offense a second time."

5. United States v. Thomas, 759 F.2d 659, 662 (8th Cir. 1985)

"Where appellants showed a non-frivolous claim of double jeopardy, the burden shifted to show, by the preponderance of the evidence, that two separate conspiracies are charged."

6. United States v. Bendis, 681 F.2d 561, 566 (9th Cir. 1981)

"We agree with the principle that once the defendant makes a non-frivolous showing of former jeopardy, the government must tender to the Court evidence indicating that separate conspiracies are charged."

Petitioner respectfully submits that the courts below erred in imposing upon him the burden of proving that the respective indictments charged him with participating in the same conspiracy. Because the opinion of the Court of Appeals for the Seventh Circuit is in conflict with the rulings of the majority of other circuits courts of appeal which impose the burden of pro-

of upon the government in such circumstances, it is necessary for this Court to grant *certiorari* and resolve the conflict of authority in the courts below.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the opinion of the United States Court of Appeals for the Seventh Circuit affirming the District Court's denial of petitioner's Motion to Dismiss Upon Grounds of Double Jeopardy.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-3163

United States of America,
Plaintiff-Appellee,

v.

Michael U. Dempsey,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois, Benton Division.
No. 85-40043—**James L. Foreman,** *Chief Judge.*

Argued May 7, 1986—Decided November 25, 1986

Before COFFEY and EASTERBROOK, *Circuit Judges,* CAMPBELL, *Senior District Judge.* *

CAMPBELL, *Senior District Judge.* In October, 1984 defendant-appellant Michael U. Dempsey was indicted in the Eastern District of Michigan (hereinafter the "Michigan indictment") for conspiring to possess marijuana with the intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The conspiracy was alleged to have taken place from January, 1974

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* The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

through December, 1982 in the Eastern District of Michigan "and elsewhere." In February, 1985 Dempsey negotiated a guilty plea to this charge. Approximately seven months later, in September, 1985, Dempsey was again indicted for conspiring to possess and distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 846. This second indictment, the subject of the instant action, (and hereinafter referred to as the "second or Southern Illinois indictment") alleged acts covering a time period from April, 1977 to December, 1983 in the Southern District of Illinois "and elsewhere." Dempsey now brings this interlocutory appeal under the authority of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 571, 69 S.Ct. 1221 (1949) and *Abney v. United States,* 431 U.S. 651, 660, 97 S.Ct. 2034, 2040 (1977) claiming the district court erred when it refused to dismiss the second indictment under the Double Jeopardy Clause of the Fifth Amendment. He also claims the indictment was fatally vague and failed to specifically inform him of the illegal conduct which he is alleged to have committed, as required by the Sixth Amendment and Rule 7 of the Federal Rules of Criminal Procedure. For the reasons set forth below, we affirm.

We start with the well-established rule that, "In claiming double jeopardy based on more than one conspiracy prosecution, a defendant bears the burden of establishing that the prosecutions are for the same offense in law and in fact." *U.S. v. Castro,* 629 F.2d 456, 461 (7th Cir. 1980). Defendant Dempsey claims his burden is merely to make a "nonfrivolous showing" that the two indictments cover the same conspiracy. Thereafter, the burden shifts to the government to show the two prosecutions are for separate offenses. (See, for example, *U.S. v. Thomas,* 759 F.2d 659 (8th Cir. 1985), *U.S. v. Stricklin,* 591 F.2d 1112 (5th Cir. 1979)). Still, the issue that remains is what constitutes a nonfrivolous showing and has Dempsey sufficiently made such a showing? The *Thomas* and *Stricklin* line of cases require a defendant to make a *prima facie* showing that the prosecutions cover the same conspiracy:

> The defendant might make the necessary prima facie nonfrivolous showing of double jeopardy by reference to the indictments, as supplemented by a bill of particulars if appropriate and ordered, and other record material, alone. He might find it necessary to offer his own testimony at the pretrial hearing. If the latter course is followed, the defendant will not thereby waive the privilege against self-incrimination and his testimony may not subsequently be used against him at the trial on the merits. *Stricklin,* 591 F.2d at 1118.

As we recognized in *Castro,* defendant's burden, ". . . is not an easy one because '[b]y the nature of the crime, the precise bounds of a single conspiracy seldom will be clear from the indictment alone.' " *Id.* at 461 (citing *U.S. v. Marable,* 578 F.2d 151, 153 (5th Cir. 1978)). ". . .[c]ourts therefore will look to both the indictments and the evidence and consider such factors as whether the conspiracies involve the same time period, alleged co-consopirators and places, overt acts, and whether the two conspiracies depend on each other for success." *Id.* at 461. We recently stated:

> "A defendant claiming that he has been subjected to double jeopardy bears the burden of establishing that both prosecutions are for the same offense . . . . The defendant must show that "the evidence required to support a conviction on one indictment would have been sufficient to warrant a conviction on other' indictment."

U.S. v. Roman, 728 F.2d 846, 857 (7th Cir. 1984) (citing *U.S. v. West,* 670 F.2d 675 (7th Cir. 1982)).

Dempsey claims he sustained his burden of proof on the double jeopardy issue by introducing evidence the marijuana he purchased from the Shure brothers in Michigan, the subject of the initial Michigan indictment, was ultimately transported to Southern Illinois, the location covered by the second, instant indictment. Dempsey notes Jack Barenfanger and Robert Picard,

co-conspirators in the Michigan indictment, verified this concrete Michigan-Southern Illinois connection. He also points to a colloquy between himself and the Court of the Eastern District of Michigan in which he admitted the Michigan-Southern Illinois connection and his continuous dealings covering these locations during this time period.

It may very well be that defendant Dempsey was continuously involved in a conspiracy to purchase drugs in Michigan and distribute them in Illinois from the mid 1970's to the early 1980's. However, it is quite conceivable that this was not the only conspiracy he was involved in during this time period. Dempsey could have been purchasing drugs from the Shure brothers in Michigan in 1978, for example, and still have been purchasing additional drugs from independent sources or dealers in Southern Illinois during the same time period. Significantly, no person named in the Michigan indictment was named in the Southern Illinois indictment. Barenfanger failed to recognize any of the people named in the second indictment. There was no evidence anyone in the Michigan indictment knew of or dealt with anyone in the Southern Illinois indictment. Defendant failed to testify on his behalf, despite being granted immunity from use of any pre-trial testimony at a subsequent trial on the merits. Of course, the defendant was not required to testify, however his failure to do so has hardly helped his argument in the instant case. Had he advanced particulars as to dates of deliveries and linked activities of the persons named in the two indictments, for example, his double jeopardy argument would be more persuasive.

As the record stands before us, we agree with the district court that it cannot be said defendant was not involved in multiple conspiracies during the time periods covered by both indictments. This does not mean a subsequent trial on the merits could not prove otherwise. However, for purposes of this interlocutory appeal defendant has failed to convince this court the two indictments cover a single conspiracy. Pertinent to this

discussion is a comment from this court in *U.S. v. Cerro,* 775 F.2d 908 (7th Cir. 1985):

> [t]he viability of wholesale drug trafficking does not depend on the adherence of any single dealer. Lop off one dealer, and the wholesaler can hire another in his place or shift the dealer's allotment of drugs to one or more of his remaining dealers or simply reduce the scale of the drug operation. The dealers are not dependent on each other as a bank robber is dependent on the driver of the getaway car and vice versa. Just as Exxon would not go out of business if it lost one of its retail dealers, so a substantial drug operation would not go out of business because one of its retail dealers left the business. *Id.* at 914.

In sum, it is quite conceivable defendant could have been involved with the Shure brothers and other dealers simultaneously. We are unwilling to conclude at this point, as was the district court, that defendant Dempsey was merely involved in a single conspiracy.

Dempsey argues he was unable to establish that the two indictments concerned the same conspiracy because it was impossible to decipher from the face of the Southern Illinois indictment what acts he was alleged to have committed. We must reject this argument. In *U.S. v. Sweeney,* 688 F.2d 1131 (7th Cir. 1982) we stated:

> "[c]ase law reveals that 'an indictment under 21 U.S.C. § 846 is sufficient if it alleges a conspiracy to distribute drugs, the time during which the conspiracy was operative and the statute allegedly violated, even if it fails to allege any specific overt act in furtherance of the conspiracy.' "

Id. at 1140 (quoting *U.S. v. Bermudez,* 526 F.2d 89 (2nd Cir. 1975)).

Clearly, the indictment in the instant case meets the *Sweeney* criteria. It alleges a conspiracy to distribute more than 1,000 pounds of marijuana from April, 1977 to November, 1983 in violation of 21 U.S.C. §§ 841(a)(1) and 846. The co-conspirators are listed. This is all that is required. The government must still prove its case at a subsequent trial on the merits. For purposes of this interlocutory appeal, defendant Dempsey has failed to establish to our satisfaction that he was involved in only one conspiracy during the time period in question.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
(Ann Arbor)

CRIMINAL ACTION NO. _____

VIOLATIONS:

21 U.S.C. §846
(Conspiracy to Distribute Marijuana)

1. That from on or about January 1, 1974 through December 31, 1982, the exact dates being unknown, in the Eastern District of Michigan and elsewhere, ARTHUR MARSHALL ARMSTRONG, JOHN THOMAS BISCHOFF, GREGORY PAUL GERBER, KENNETH TURECK, CHRISTOPHER STEPHEN McKESSON, MICHAEL U. DEMPSEY, JERRY MITCHELL, DAVID LUGE QUERFELD and ROBERT EUGENE HOWE, Defendants herein, did knowingly and intentionally combine, conspire, confederate and agree together, with Ned Garrett Shure and Fred Charles Shure, and others both known and unknown to the grand jury, to possess with intent to distribute and to distribute marijuana, a Schedule I Controlled Substance, in violation of Title 21, United States Code, Sections 841(a)(1) and (a)(6); all in violation of Title 21, United States Code, Section 846.

2. That it was part of said unlawful conspiracy that Defendant ARTHUR MARSHALL ARMSTRONG would receive bulk quantities of marijuana from the Shure brothers or their employees for purposes of redistribution. Said quantities of marijuana exceeded 1000 pounds after September 26, 1980.

3. That it was further part of said unlawful conspiracy that Defendant JOHN THOMAS BISCHOFF would receive bulk quantities of marijuana from the Shure brothers or their

employees for purposes of redistribution. Said quantities of marijuana exceeded 1000 pounds after September 26, 1980.

4. That it was further part of said unlawful conspiracy that Defendant GREGORY PAUL GERBER would receive bulk quantities of marijuana from the Shure brothers or their employees for purposes of redistribution. Said quantities of marijuana exceeded 1000 pounds after September 26, 1980.

5. That it was further part of said unlawful conspiracy that Defendant KENNETH TURECK would receive bulk quantities of marijuana from the Shure brothers or their employees for purposes of redistribution. Said quantities of marijuana exceeded 1000 pounds after September 26, 1980.

6. That it was further part of said unlawful conspiracy that Defendant CHRISTOPHER STEPHEN McKESSON would receive bulk quantities of marijuana from the Shure brothers or their employees for purposes of redistribution. Said quantities of marijuana exceeded 1000 pounds after September 26, 1980.

7. That it was further part of said unlawful conspiracy that Defendant MICHAEL U. DEMPSEY would receive bulk quantities of marijuana from the Shure brothers or their employees for purposes of redistribution. Said quantities of marijuana exceeded 1000 pounds after September 26, 1980.

8. That it was further part of said unlawful conspiracy that Defendant JERRY MITCHELL would receive bulk quantities of marijuana from the Shure brothers or their employees for purposes of redistribution.

9. That it was further part of said unlawful conspiracy that Defendant DAVID KLUGE QUERFELD would work and reside at a home at 2623 North Territorial Road, Webster Township, Michigan where large quantities of marijuana would be received, stored and/or processed by him and thereafter turned over to redistributors of the Shure brothers.

10. That it was further part of said unlawful conspiracy that Defendant DAVID KLUGE QUERFELD would receive and transport large quantities of currency, between California and Michigan, for and on behalf of the Shure brothers, said currency having been derived from the sale of marijuana.

11. That it was further part of said unlawful conspiracy that Defendant ROBERT EUGENE HOWE would transport truckloads of marijuana for and on behalf of the Shure brothers from Florida, North Carolina and Louisiana to Ann Arbor, Michigan and elsewhere. Said quantities of marijuana exceeded 1000 pounds after September 26, 1980.

All in violation of Title 21, United States Code, Section 846.

FOREPERSON

LEONARD R. GILMAN
United States Attorney

MICHAEL C. LEIBSON
Assistant United States Attorney

MARTIN E. CRANDALL
Special Attorney
Organized Crime Strike Force

Dated: October 25, 1984

APPENDIX C

Transcript of Plea of Guilty Hearing before U.S. District Court, Eastern District of Michigan

[10] Q What happened here?

A I made trips to Michigan and picked up the marijuana and took it back to Illinois.

Q And when did this occur?

A During the dates stated.

Q Where did you live, in Illinois?

A I lived in a rural area, on a farm near Anna, Illinois, which is the southern part of the State of Illinois.

Q Southern part?

A Yes, approximately 30, 30 miles from Cairo, Illinois.

Q What was your intention when you took it back there?

A Redistribution and sales.

Q And how much, how much was involved?

A I'm not sure of the amounts; it's been several years since I was involved in this.

I have no recollection of many of the people involved, or the amounts.

Q Was it more than 1,000 pounds?

A Yes, your Honor, it was.

THE COURT: Any other facts you want to put on the record, Mr. Legghio?

MR. LEGGHIO: No.

I think the defendant has provided a sufficient factual basis, your Honor.

THE COURT: I'll accept your plea; I find it's [11] been made voluntarily, knowledgeable; find it has a basis in fact; fine it contains all the elements of the crime; find you understand your rights; find you understand the consequences of your plea, and I find you're guilty.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CRIMINAL NO. 85-40043

Title 21
Sections 843(b) and 846
Title 26
Section 7206(1)
United States Code

United States of America,
Plaintiff,

vs.

Steven L. Antonacci, Roy Slater, Merle Slater,
Larry J. Bowen, Larry CArl Davis, Michael U. Dempsey,
John A. Underwood, George Spann, John H. Newsome,
Martin R. Payeur, and Robert C. Steeples,
David R. Bullock, Gary A. Brown, and Jeffrey M. Duke,

THE GRAND JURY CHARGES:

COUNT 1

From in or about April 1, 1977, and continuing thereafter until in or about November, 1983, in Jackson, Williamson, Union, Perry, Clinton, Jefferson and St. Clair Counties, within the Southern District of Illinois and elsewhere.

Steven L. Antonacci
Roy Slater,
Merle Slater,
Larry J. Bowen,
Larry Carl Davis,
Michael U. Dempsey,
John A. Underwood,
George Spann,

John H. Newsome,
Martin R. Payeur,
Robert C. Steeples,
David R. Bullock,
Gary A. Brown, and
Jeffrey M. Duke,

did conspire and agree together with unindicted co-conspirators, Ernest Poland, Nancy Poland, Larry Liefer, Jack A. Hrvatin, Judy L. Hrvatin, John James Buchana, Douglas Hatchett and with others known and unknown to the grand jury to knowingly and intentionally distribute more than 1,000 pounds of marijuana, a Schedule I Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1); all in violation of Title 21, United States Code, Section 846.

COUNT 2

That on or about the 15th day of April, 1984, in the Southern District of Illinois, STEVEN L. ANTONACCI, a resident of Ava, Illinois, did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1983, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be ture an correct as to every material matter in that the said return failed to report income and expenses from the business of trafficking in controlled substances, whereas, as he then and there well knew and believed, he had had extensive business dealings in trafficking in controlled substances, in violation of Section 7206(1), Internal Revenue Code; all in violation of Title 26, United States Code, Section 7206(1).

COUNT 3

On or about March 23, 1983, in Union County, within the Southern District of Illinois, STEVEN L. ANTONACCI know-

ingly and intentionally used a communication facility to facilitate the commission of an act constituting a felony, to wit: conspiracy to distribute marijuana, a Schedule I Controlled Substance, in that he talked by telephone to Jerome Solomon in Union County, Illinois, to arrange for the sale of a quantity of marijuana, in violation of Title 21, United States Code, Sections 846 and 841(a)(1); all in violation of Title 21, United States Code, Section 843(b).

A TRUE BILL

FOREPERSON

Frederick Hess
UNITED STATES ATTORNEY

Recommended Bond: $50,000 cash, all defendants

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Criminal No. 85-40043

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MICHAEL DEMPSEY, et al.,
Defendants.

MEMORANDUM AND ORDER

FOREMAN, Chief Judge:

Before the Court is Defendant Dempsey's Motion to Dismiss on the grounds of double jeopardy. For the reasons stated on the record at the hearing on this matter held December 9, 1985, the Motion is hereby DENIED. In addition, Defendant Dempsey's proposed exhibits 4 through 10 were refused admission due to the defendant's failure to establish an adequate foundation for their admissibility.

IT IS SO ORDERED.

DATED: December 11, 1985

/s/ James L. Foreman
CHIEF JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 77-3072

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JACK MOODY STRICKLIN, JR.
Defendant-Appellant.

Before COLEMAN, GEE and HILL, Circuit Judges.

JAMES C. HILL, Circuit Judge:

This is an appeal by Jack Moody Strickland, Jr., from the District Court's denial of his motion to dismiss an indictment handed down in El Paso, Texas, on double jeopardy grounds. The pretrial order rejecting Stricklin's claim that two previous indictments handed down in Tennessee and New Mexico resulted in former jeopardy is properly before us as a final decision within the meaning of 28 U.S.C. § 1291. *Abney v. United States,* 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). The issue in this case is whether the District Court correctly denied Stricklin's motion to dismiss. We affirm the District Court with respect to the substantive charges of importing and of aiding and abetting, as well as the importation conspiracy charge, but reverse and remand on the possession with intent to distribute conspiracy charge and the continuing criminal enterprise charge so that the District Court can rehear that part of the motion and apply the procedural standards set forth below.

I. *The Indictments*

The Tennessee indictment was returned against Stricklin on August 23, 1973. The District Court's order that the govern-

ment supplement the indictment with a bill of particulars was complied with on January 21, 1975. The government charged that Stricklin conspired with thirty-nine co-defendants and others whose names were unknown to distribute and possess with intent to distribute marijuana, a schedule I non-narcotic controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and 846 and the predecessor of those statutes, 21 U.S.C. § 176a. It was also charged that the defendants and unknown coconspirators did unlawfully possess with intent to distribute and distribute marijuana in violation of first 21 U.S.C. § 176a and 18 U.S.C. § 2 and then 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. The indictment charged that the conspiracy continued from on or about December, 1970, to August 23, 1973. The bill of particulars recited overt acts in El Paso, Texas; Murfreesboro, Tennessee; Lebanon, Tennessee; Dickson, Tennessee; Atlanta, Georgia; Nashville, Tennessee; Toronto, Canada; Louisville, Kentucky; Knoxville, Tennessee; Winchester, Tennessee; Orlando, Florida; Cookeville, Tennessee; and Tucson, Arizona, between May, 1971, and May, 1973.

The New Mexico indictment was returned against Stricklin on August 29, 1974. This indictment charged that Stricklin conspired with five codefendants and others whose names were unknown to possess with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a). They were also charged with unlawful possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a) and 18 U.S.C. § 2. The indictment charged that the conspiracy took place on or about August 18, 1974, in the State and District of New Mexico, and elsewhere. The possession was alleged to have occurred on or about August 18, 1974, in New Mexico.

The original Texas indictment was returned against Stricklin on June 16, 1977, and a superceding indictment was returned on September 15, 1977.[1] The original indictment charged that

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[1] A superceding indictment may be returned at any time before a trial on the merits. *United States v. Herbst,* 565 F.2d 638, 643 (10th

Stricklin: (1) conspired with thirteen coconspirators and others whose names were unknown to import marijuana in violation of 21 U.S.C. §§ 952(a) and 963; (2) did import and cause to be imported marijuana in violation of 21 U.S.C. §§ 960(a)(1) and 952(a); (3) conspired with thirteen coconspirators and others whose names were unknown to possess with intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 846; (4) aided and abetted two individuals (named as coconspirators) on three separate occasions in their unlawful possession of marijuana in violation of 21 U.S.C. § 841(a)(1) and thus violated 18 U.S.C. § 2; and (5) engaged in a continuing criminal enterprise by virtue of his marijuana transactions and thus violated 21 U.S.C. § 848. The importation conspiracy was alleged to have continued from on or before September, 1971, to on or about

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Cir. 1977); *United States v. Millet,* 559 F.2d 253, 257-58 (5th Cir. 1977), *cert. denied,* 434 U.S. 1015, 98 S.Ct. 732, 54 L.Ed.2d 759 (1978); *United States v. White,* 524 F.2d 1249, 1253 (5th Cir. 1975), *cert. denied,* 426 U.S. 922, 96 S.Ct. 2629, 49 L.Ed.2d 375 (1976). Indeed, two indictments may be outstanding at the same time for the same offense if jeopardy has not attached to the first indictment. *United States v. Cerilli,* 558 F.2d 697, 700 (3d Cir.), *cert. denied,* 434 U.S. 966, 98 S.Ct. 507, 54 L.Ed.2d 507 (1977); *United States v. Holm,* 550 F.2d 568, 569 (9th Cir.), *cert. denied,* 434 U.S. 856, 98 S.Ct. 176, 54 L.Ed. 127 (1977); *United States v. Grady,* 544 F.2d 598, 602 n. 4 (2d Cir. 1976); *De Marrias v. United States,* 487 F.2d 19, 21 (8th Cir. 1973), *cert. denied,* 415 U.S. 980, 94 S.Ct. 1570, 39 L.Ed.2d 877 (1974); *United States v. Garcia,* 412 F.2d 999, 1000 (10th Cir. 1969). Since the original indictment apparently was never dismissed, there are technically two pending indictments against Stricklin, and it appears that the government may select one of them with which to proceed to trial. *United States v. Cerilli,* 558 F.2d at 700 n. 3. The superceding indictment was not filed until after the pretrial double jeopardy hearing, so that Stricklin's argument at the hearing was concerned with the original indictment. The District Court, however, referred only to the superceding indictment's conspiracy charges in its order denying Stricklin's motion. At oral argument, the government indicated that it may attempt to proceed on a combination of the two indictments because the superceding indictment deals only with a portion of the original indictment's charges. Hence, we will consider both indictments for purposes of this review.

June 24, 1976, in the Western District of Texas, the States of New Mexico, Georgia, and Tennessee, the Republic of Mexico, and other places unknown to the grand jury. This conspiracy count recited fourteen overt acts in El Paso Texas; Carlsbad, New Mexico; the Republic of Mexico; Magdalena, New Mexico; and the Western District of Texas, between September, 1971, and November, 1973. The substantive importation count alleged the Western District of Texas as the *locus criminis* and July 18, 1972, as the approximate time that the offense occurred. The possession conspiracy was alleged to have taken place during the same time frame and in the same locations as the importation conspiracy. The twelve overt acts recited in support of the possession conspiracy were identical to twelve of the overt acts recited in the importation conspiracy count and thus covered the same time frame and area as did that count. The three aiding and abetting violations were alleged to have taken place in the Western District of Texas on June 22, 1972; July 5, 1972; and July 18, 1972. The original indictment lastly charged Stricklin with operating a continuing criminal enterprise by virtue of his status in the marijuana transactions recited in the previous counts; this enterprise was alleged to have operated from on or before June 18, 1972, until on or about June 24, 1976, in the Western District of Texas, the Republic of Mexico, the District of Columbia, New Mexico, North Carolina, Georgia, Minnesota, and other places unknown to the grand jury.

The superceding indictment was not prepared and filed until *after* the double jeopardy hearing where Stricklin had pointed out the apparent overlaps between the New Mexico indictment and the then pending Texas indictment. The superceding indictment charged Stricklin with essentially the same importation and possession conspiracies as charged in the original indictment, except that the names of five coconspirators were deleted and the reference to Tennessee as one of the locations for the conspiracies was omitted. Five overt acts were also eliminated

from each conspiracy count, shortening the time span for the acts supporting the importation conspiracy to on or about December, 1971, to November, 1972, and for the acts supporting the possession conspiracy to on or about December, 1971, to October, 1972. The omission of these acts also deleted the references to Magdalena, New Mexico, one of the references to El Paso, Texas, and the references to two of the orginally named coconspirators who were not included in the charging portions of the superceding indictment. Basically, the government simply carved out and discarded those specific references to those specific overlaps.

The Tennessee indictment was dismissed with prejudice on March 18, 1975, because of the government's failure to grant Stricklin a speedy trial in accord with his constitutional right under the Sixth Amendment. The New Mexico indictment resulted in a conviction on both counts on March 14, 1975, and Stricklin received a five year prison sentence. The Texas indictment was returned on June 16, 1977. On August 17, and 26, 1977, Stricklin moved before the District Court to dismiss the Texas indictment on the grounds that the Tennessee indictment, which was dismissed with prejudice, and the New Mexico indictment, which resulted in his conviction, had placed him in former jeopardy. A pretrial double jeopardy hearing took place on August 31, 1977; the government filed the superceding indictment on September 15, 1977; and the District Court issued an order denying Stricklin's motion on September 27, 1977. The District Court found that the four substantive counts pertaining to unlawful importation and possession with intent to distribute marijuana within the Western District of Texas presented no possible double jeopardy problem. With regard to the two conspiracy counts, the District Court found that a comparison of the Tennessee and New Mexico indictments with the superceding indictment in Texas, in light of the evidence obtained at the hearing, reflects that each alleges different transactions and overt acts and that, in any event, jeopardy had never at-

tached in the Tennessee case. Concerning the continuing criminal enterprise count, the District Court found that the government did not have sufficient proof in either the Tennessee or New Mexico conspiracy case to sustain a conviction for a violation of 21 U.S.C. § 848, so that there was no double jeopardy bar to this subsequent prosecution for the greater offense. This appeal followed.

II. *The Application of Abney*

Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), held that the denial of a motion to dismiss an indictment on double jeopardy grounds results in an appealable final order. Thus, the double jeopardy issue may be decided and appealed *before* a record of the trial on the challenged indictment is made. *Abney* may be applied without serious complexity where the indictments and the record from the previous trial are sufficiently explicit to provide for clear-cut determination of the double jeopardy claim. For example, where X is one indicted and tried for the murder of Y, a subsequent indictment charging that X murdered Y would clearly violate X's Fifth Amendment right not to be twice put in jeopardy for the same offense. Where, however, the charges in two or more indictments involve crimes such as complicated or far-reaching conspiracies, as in this case, the application of *Abney* can be troublesome, especially when one of the previous indictments did not result in a trial and the creation of a record. It is necessary, then, to establish procedural rules for an *Abney* pretrial double jeopardy hearing, so that requirements such as going forward with proof, burden of persuasion, and weight of the evidence are equitably assigned to and understood by the parties. The Third Circuit was recently confronted with an identical task in *United States v. Inmon,* 568 F.2d 326 (3d Cir. 1977). We adopt their well-reasoned opinion in that case as the law in this Circuit, along with such modifications and additions as our comments may provide.

It is undisputed that the burden of going forward by putting the double jeopardy claim in issue is and should be on the defendant. It is similarly reasonable to require the defendant to tender a prima facie nonfrivolous double jeopardy claim before the possibility of a shift of the burden of persuasion to the government comes into play. Once the defendant has come forward with such a prima facie nonfrivolous claim, however, we are faced with determining whether the defendant or the government should carry the burden of persuasion from that point forward. The Third Circuit in *Inmon* concluded that the burden should then be placed on the government, basing its decision on practical considerations concerning access to proof and on the government's control over the particularity with which indictments are drafted. 568 F.2d at 329-32. *Accord, United States v. Mallah,* 503 F.2d 971 (2d Cir. 1974), *cert. denied,* 420 U.S. 995, 95 S.Ct. 1425, 43 L.Ed.2d 671 (1975). We agree, for similar reasons, that the burden of establishing that the indictments charge separate crimes is most equitably placed on the government when a defendant has made a nonfrivolous showing that an indictment charges the same offense as that for which he was formerly placed in jeopardy.

The defendant might make the necessary prima facie nonfrivolous showing of double jeopardy by reference to the indictments, as supplemented by a bill of particulars if appropriate and ordered, and other record material, alone. He might find it necessary to offer his own testimony at the pretrial hearing. If the latter course is followed, the defendant will not thereby waive the privilege against self-incrimination and his testimony may not subsequently be used against him at the trial on the merits. In *Simmons v. United States,* 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), the Supreme Court held that a defendant may testify in a pretrial suppression hearing directed at vindication of Fourth Amendment rights without fear that his testimony will be used against him at the subsequent trial. The Supreme Court reasoned that any other rule would inhibit

defendants from asserting Fourth Amendment claims and would require that one constitutional right be surrendered in order to assert another. 390 U.S. at 392-94, 88 S.Ct. 967. We agree with the *Inmon* Court that the reasoning in *Simmons* is also controlling in a pretrial double jeopardy hearing.

Other evidence normally available to the defendant at the pretrial stage may, of course, also be offered in his attempt to make a prima facie showing of former jeopardy, but our resolution of *Abney's* procedural problems in no way expands or alters the discovery now available to defendants. Material which is presently unavailable to the defendant through discovery or any other means is not made more accessible by our holding in this case.

The impracticality of placing the burden of persuasion on the defendant in this situation is obvious in light of his lack of access to the proof on which the government proposes to rely and his inability to offer immunity to prospective witnesses. *See United States v. Herman,* 589 F.2d 1191 (3d Cir.) (1978); *United States v. Inmon,* 568 F.2d at 329-30; *United States v. Allstate Mortgage Corp.,* 507 F.2d 492, 494-95 (7th Cir. 1974), *cert. denied,* 421 U.S. 999, 95 S.Ct. 2396, 44 L.Ed.2d 666 (1975); *United States v. Smith,* 436 F.2d 787, 790 (5th Cir.), *cert. denied,* 402 U.S. 976, 91 S.Ct. 1680, 29 L.Ed.2d 142 (1971). Where a prior indictment resulted in a guilty plea or was dismissed, so that there is no record of the evidence supporting the prior indictment, the defendant is even further handicapped. The government is clearly in a better position to show that the crime charged in the present indictment is not the same as one charged in a previous indictment than the defendant is to show that the crimes are the same.

The government's responsibility for securing an indictment which is sufficiently detailed to inform the defendant of the charges against him and to allow him later to claim the defense of double jeopardy if he be again charged with that crime fur-

ther justifies placing the burden of persuasion on the government. *See Hamling v. United States,* 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). Traditionally, courts have been understandably reluctant to interfere and require more particularity on potential double jeopardy grounds; it is a most difficult task to look ahead down the road and predict what future crimes may be charged by a subsequent indictment. Since the government controls the particularity of an indictment, it should bear the responsibility for any ambiguities resulting in its vagueness that are left unresolved by a bill of particulars. The government may be said to make the following representation to the court when it proceeds on an indictment: "This indictment is sufficient. If the defendant is hereafter charged on another indictment and it apears prima facie that this indictment has already charged him with that offense, then we accept the burden of showing that the new charge is different." From the government's point of view, its interests are also served by securing detailed indictments because a meritless claim of double jeopardy in a subsequent case will be easier to refute. We hope that the salutary effect of our assigning the burden as we do will be more carefully drawn indictments, especially in conspiracy cases where the tendency is to use all-encompassing, vague language.

Once the burden of persuasion has shifted to the government by virtue of the defendant's presentation of a prima facie nonfrivolous claim of prior jeopardy, the government is not compelled to come forward with any particular kind of evidence. It may present however much or little evidence as it deems advisable, subject, of course, to dismissal of the indictment if not enough evidence to rebut the defendant's prima facie showing is introduced. The weight of the evidence by which the government must demonstrate that two separate crimes are charged is a preponderance of the evidence. Again, our conclusion comports with that of the Third Circuit in *Inmon,* wherein they

point out that the Fifth Amendment double jeopardy privilege is personal and waivable and not an element of the crime, so that a heavier evidentiary burden is, by implication, not constitutionally required by *Lego v. Twomey,* 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972) (voluntariness of confession may be determined by preponderance of the evidence). 568 F.2d at 332. The determination of whether or not a prima facie claim of double jeopardy has been shown and, if so, rebutted by a preponderance of the evidence is best made by the court and not by the jury. The likelihood of compelling the defendant to make possibly incriminating statements to the jury about the earlier offense in his defense to the subsequent charge or of prejudicing the jurors against the defendant by virtue of their hearing about the charge and evidence in the previous case is thus eliminated.

Although the government may not be forced to reveal to the defendant any materials or information not otherwise available through discovery or other means, it might choose to submit such material to the District Court for *in camera* inspection and might thus carry its burden of persuasion.

Even if the government does carry its burden of persuasion and the defendant's motion to dismiss is denied, the District Court may later vacate its finding of no prior jeopardy as the evidence develops at trial if the defendant renews his motion and the evidence shows that there was, in fact, prior jeopardy. The ruling by the District Court on the pretrial motion merely decides whether or not, upon the evidence *then before the court,* double jeopardy appears. On an *Abney* appeal, the correctness of that ruling, alone, will be reviewed. Neither the District Court's nor the Circuit Court's pretrial decision will be binding as res judicata, law of the case, collateral estoppel, or any other theoretical bar as to the double jeopardy issue in the case.

III. *Stricklin's Double Jeopardy Claim*

We turn now to the application of the procedural rules heretofore discussed to the facts in this case. Stricklin claims that the Double Jeopardy Clause of the Fifth Amendment bars the government's attempt to prosecute him in Texas on the conspiracies charged because the alleged conspiracies were encompassed in conspiracies alleged in two previous indictments pursuant to which he was subjected to jeopardy. Close analysis of this case reveals that we are actually confronted with an unusual and complex blend of double jeopardy and speedy trial problems.

A. The Tennessee Indictment

We begin our analysis with the observation that the Tennessee indictment's dismissal with prejudice for violation of Stricklin's speedy trial rights under the Sixth Amendment did not invoke jeopardy. *United States v. Marion,* 404 U.S. 307, 312, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). A motion to dismiss before trial for lack of speedy prosecution has

> nothing to do with guilt or innocence or the truth of the allegations in the indictment but [is], rather, a plea in the nature of confession and avoidance, that is, where the defendant does not deny that he has committed the acts alleged and that the acts were a crime but instead pleads that he cannot be prosecuted because of some extraneous factor, such as . . . the denial of a speedy trial.

404 U.S. at 312, 92 S.Ct. at 459. For a jury trial, jeopardy attaches when the jury is empaneled and sworn. For a bench trial, jeopardy attaches when the judge begins to receive evidence. *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 569, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977); *Illinois v. Sommerville,* 410 U.S. 458, 471, 93 S.Ct. 1066, 35 L.Ed.2d (1973); *Downum v. United States* 372 U.S. 734, 736, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963). This Court noted in *United States v. Pitts,* 569 F.2d 343,

347 n. 5 (5th Cir.), *cert. denied,* 436 U.S. 959, 98 S.Ct. 3076, 57 L.Ed.2d 1125 (1978), that "[s]ufficient constitutional and statutory measures protect defendants in cases that might be tainted by an overzealous prosecutor abusing the rules marking the attachment of jeopardy to make abandonment of those rules unnecessary" where a previous indictment had been dismissed at the government's request. In this case, Stricklin's Sixth Amendment constitutional right to a speedy trial protects him from the government's again bringing those charges contained in the Tennessee indictment which was dismissed with prejudice on constitutional speedy trial grounds. Stricklin cannot be reindicted for the same crime because Sixth Amendment speedy trial rights could, otherwise, be easily bypassed. *Mann v. United States,* 113 U.S.App.D.C. 27, 30 304 F.2d 394, 397, *cert. denied,* 371 U.S. 896, 83 S.Ct. 194, 9 L.Ed.2d 127 (1972). *Accord, United States v. Simmons,* 536 F.2d 827, 833 (9th Cir.), *cert. denied,* 429 U.S. 854, 97 S.Ct. 148, 50 L.Ed.2d 130 (1976); *United States v. Correia,* 531 F.2d 1095, 1097 (1st Cir. 1976); *United States v. Clay,* 481 F.2d 133, 135 (7th Cir.), *cert. denied,* 414 U.S. 1009, 97 S.Ct. 371, 38 L.Ed.2d 247 (1973); *United States v. Beidler,* 417 F.Supp. 608, 616 (M.D.Fla. 1976).

While Stricklin cannot be reindicted for the same conspiracy for which he was charged in the Tennessee indictment, the government is not barred from using the underlying facts in that offense as the basis for a charge that he committed a different offense. As we noted in *United States v. Rivero,* 532 F.2d 450, 457 (5th Cir. 1976), "the dismissal of the indictment, with or without prejudice, does not amount to the determination of any of the intrinsic underlying facts. What, and all, it stands for, is that the defendant cannot be reindicted or tried for that same charge."

We do not reach the question of whether the Texas indictment is barred under the Sixth Amendment by virtue of charging Stricklin with the same crime as charged in the dismissed Tennessee indictment. While *Abney* establishes that the denial

of a double jeopardy claim is a final and appealable decision within the meaning of 28 U.S.C. § 1291, there is no comparable jurisdictional basis on which to exercise pre-trial review of an indictment which is potentially barred by Sixth Amendment speedy trial considerations. The Supreme Court recently held in *United States v. MacDonald,* 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978), that a defendant may not, *before* trial, appeal a federal district court's order denying his motion to dismiss an indictment because of an alleged violation of his Sixth Amendment right to a speedy trial. *Accord, United States v. Bailey,* 512 F.2d 833 (5th Cir.), *cert. dismissed,* 423 U.S. 1039, 96 S.Ct. 578, 46 L.Ed.2d 415 (1975). Stricklin's situation is different from that found in *MacDonald* since the possible violation of his rights lies in his being reindicted on the same charges which were the subject of an indictment already dismissed on speedy trial grounds rather than in his being brought to trial on the first indictment, as in *MacDonald.* The basic consideration in both cases, however, is whether the defendants' speedy trial rights will be violated by the impending prosecutions, and for us to expand appellate jurisdiction to include the situation where the dismissed indictment is claimed to bar a subsequent indictment on speedy trial grounds would be unwarranted.

In any event, the argument is not properly before us because Stricklin incorrectly bases his argument regarding the Tennessee indictment on double jeopardy grounds rather than on speedy trial grounds. Our discussion of the speedy trial aspects of this case is a necessary part of our rejection of Stricklin's double jeopardy claim concerning the Tennessee indictment. We anticipate that the defendant will take heed on remand and make the proper argument; the District Court will then, of course, make the proper analysis.

B. The New Mexico Indictment

There is no doubt that jeopardy attached in the trial on the New Mexico indictment; Stricklin was convicted on charges of

possession with intent to distribute marijuana and conspiracy to possess with intent to distribute marijuana. We must now discern whether or not Stricklin has brought forth a prima facie nonfrivolous claim that the government seeks to charge him again for the same crime in the Texas indictment.

In the double jeopardy context, the position of the parties is reversed from that usually taken in trials of conspiracy cases. In the latter, it is usually the government's position that all similar conduct proven is part of one far-reaching conspiracy. The defendant generally asserts that, if conspiracy be shown at all, his activity was separate from, and not connected with, the conspiracy charged.

In the dispute over double jeopardy, however, it is the defendant who asserts that the earlier indictment was sufficiently broad to encompass all of his conduct, and the government asserts the narrow, limited scope of its earlier indictment. Here, Stricklin insists that the New Mexico indictment covered certain conduct for which he is now indicted in Texas, and the government argues that the New Mexico indictment was limited in scope to the single transaction recited therein. This conflict sufficiently demonstrates the need for care and definition in the drawing of indictments in conspiracy cases.

At his double jeopardy hearing, Stricklin introduced material obtained in a Nevada trial under the Jenck's Act. This evidence tends to show that Stricklin entered into a conspiracy with Don Johnson and Tim Melancon, two of the conspirators named in the original Texas indictment, to import marijuana into the United States after the Tennessee conspiracy was terminated.[2] It

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[2] Stricklin asserts that the New Mexico conspiracy was a different conspiracy than the one with which he was charged in Tennessee. Even if the New Mexico conspiracy had been a continuation of the Tennessee conspiracy, further operation of the "old" conspiracy after being charged with that crime becomes a new offense for purposes of a double jeopardy claim.

appears from the evidence in the record that two loads of marijuana were flown to New Mexico from the Republic of Mexico by Don Johnson and Tim Melancon. The first load was apparently the load that was involved in those overt acts taking place in March and November of 1973, near Magdalena, New Mexico, and mentioned in both the conspiracy to import count and the conspiracy to possess with intent to distribute count of the original Texas indictment. The second load was seized in New Mexico on August 18, 1974, in Stricklin's possession; this incident served as the basis of the New Mexico indictment and conviction. With regard to that portion of the original Texas indictment which Stricklin asserts refers to the New Mexico conspiracy to possess with intent to distribute for which he was previously convicted, Stricklin's burden of coming forth with a prima facie nonfrivolous double jeopardy claim is met. We pointed out in *United States v. Ruigomez,* 576 F.2d 1149, 1151 (5th Cir. 1978), that "the relevant question [in narcotics conspiracy cases] is . . . whether the particular transactions alleged in the indictments were within a larger, unified conspiracy." The evidence which Stricklin proffers satisfies

> the usual tests for determining the existence of a unified conspiracy—the participants shared a continuing, common goal of [importing] marijuana for profit; the operations of the conspiracy followed an unbroken and repetitive pattern; and the cast of conspirators remained much the same.

576 F.2d at 1151. As we indicated in *United States v. Marable,* 578 F.2d 151, 154 (5th Cir. 1978),

> [o]ur examination of the record focuses upon these elements: (1) time, (2) persons acting as coconspirators, (3) the statutory offenses charged in the indictments, (4) the overt acts charged by the government or any other description of the offense charged with indicates the nature and scope of the activity which the government sought to

punish in each case, and (5) places where the events alleged as part of the conspiracy took place.

Our consideration of the foregoing factors leads to the conclusion that Stricklin makes a prima facie showing that the events charged in the original Texas indictment relating to the Magdalena episode and the events charged in the New Mexico indictment were part of a single agreement.

The government's obtaining a new indictment subsequent to the hearing, which deletes all references to Don Johnson, Tim Melancon, and the Magdalena, New Mexico, episode is of no consequence to our finding, for, as we pointed out earlier, the original indictment was never dismissed. In fact, the government's revision of the conspiracy counts may not bode well for their assertion that the conspiracies for which they seek to prosecute in the Texas indictment are clearly distinct from the conspiracies for which Stricklin has previously been indicted.

Stricklin's prima facie showing of former jeopardy goes only to the conspiracy count for possession with intent to distribute and not to the conspiracy count for importation or to the substantive counts for aiding and abetting the unlawful possession of marijuana and for importation. The government may constitutionally charge a defendant with conspiracy to import, as well as with conspiracy to possess with intent to distribute, despite the existence of only one conspiratorial agreement. *United States v. Marable,* 578 F.2d at 154 n. 1; *United States v. Ruigomez,* 576 F.2d at 1151 n. 2; *United States v. Dyar,* 574 F.2d 1385, 1389-90 (5th Cir. 1978); *United States v. Houltin,* 525 F.2d 943, 950-51 (5th Cir.), *vacated on other grounds, sub nom. Croucher v. United States,* 429 U.S. 1034, 97 S.Ct. 725, 50 L.Ed.2d 745 (1976). The Double Jeopardy Clause imposes few limits on the legislative power to define offenses, and Congress may choose to punish two aspects of conspiratorial behavior without violating the Fifth Amendment. *See United States v. Sanabria,* 437 U.S. 54, 70 n. 24 and accompanying text, 98 S.Ct. 2170, 2181-82, 57 L.Ed.2d 43 (1978).

Similarly, each of the three substantive counts for aiding and abetting and the substantive count for importation allege separate offenses. *See Iannelli v. United States,* 420 U.S. 770, 777 n. 10, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975); *Pereira v. United States,* 347 U.S. 1, 11-12, 74 S.Ct. 358, 98 L.Ed. 435 (1954. Stricklin was convicted under the New Mexico indictment of possessing marijuana with intent to distribute on or about August 18, 1974. The possession offenses which he is charged in the Texas indictment with having aided and abetted took place on June 22, 1972; July 5, 1972; and July 18, 1972. The importation offense is alleged to have occurred on July 18, 1972. Clearly, the conviction for the substantive offense in the New Mexico indictment did not constitute prior jeopardy for the substantive offenses charged in the Texas indictment.[3]

Stricklin's final argument is that the Texas indictment's continuing criminal enterprise charge under 21 U.S.C. § 848[4] is barred by the Double Jeopardy Clause as interpreted in *Jeffers v. United States,* 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977), and *Brown v. Ohio,* 432 U.S. 161, 97 S.Ct. 2221, 53

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[3] A defendant could successfully argue double jeopardy where two separate substantive offenses are involved if a plea bargain on the prior indictment led to dismissal of the offense thereafter charged in the subsequent indictment.

[4] A person engages in a continuing criminal enterprise, as defined in 21 U.S.C. § 848(b)(2), if he violates the Drug Act in a continuing series of such violations

> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

United States v. Bolts, 558 F.2d 316, 320 (5th Cir.), *cert. denied, sub nom. Hicks v. United States,* 434 U.S. 930, 98 S.Ct. 417, 54 L.Ed.2d 290 (1977).

L.Ed.2d 187 (1977). *Jeffers* and *Brown* deal with the Double Jeopardy Clause in the context of greater and lesser included offenses. *Jeffers* is particularly pertinent to this case because the two offenses involved there were a conspiracy to distribute heroin and cocaine in violation of 21 U.S.C. § 846 and a continuing criminal enterprise to violate the drug laws in violation of 21 U.S.C. § 848. Although the facts in *Jeffers* made it unnecessary to settle definitively the issue of whether § 846 is a lesser included offense of § 848, 432 U.S. at 152-53 n. 20, 97 S.Ct. 2207, the Court's discussion of the issue indicates that the question would be answered affirmatively because § 848 requires proof of an agreement among the persons involved in the continuing criminal enterprise and thus requires proof of every fact necessary to show a violation under § 848 as well as proof of several additional elements. *Id.* at 147-54, 97 S.Ct. 2207. *See also Id.* at 160 n. 7, 97 S.Ct. 2207. *See also Id.* at 160 n. 7, 97 S.Ct. 2207 (Stevens, J., concurring in part). Furthermore, it is our conclusion that § 846 is a lesser included offense of § 848 where the agreement and transactions involved in the two cases are the same. A double jeopardy defense will lie where the government has previously prosecuted a defendant under either § 846 or § 848 and then seeks to prosecute him again on the basis of the same criminal agreement under the other statute. "Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense." *Brown v. Ohio,* 432 U.S. at 169, 97 S.Ct. at 2227. Even if the defendant shows that the conspiracy for which he was prosecuted under § 846 is the same conspiracy which serves as an element of his § 848 prosecution, the double jeopardy inquiry does not necessarily end there.

> An exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence. *See Diaz v. United States,* 223 U.S. 442,

448-449 [32 S.Ct. 250, 56 L.Ed. 500] (1912), *Ashe v. Swenson, supra,* [397] at [436] 453 n. 7 [90 S.Ct. 1189, 25 L.Ed.2d 469] (Brennan, J. concurring).

Id. at 169 n. 7, 97 S.Ct. at 2227.

Our application of *Jeffers* and *Brown* to the facts in this case begins with determining whether or not Stricklin has made a prima facie nonfrivolous showing that the agreement and transactions which served as the basis for his New Mexico § 846 conspiracy conviction are the same as those involved in the continuing criminal enterprise charge in the Texas indictment. The continuing criminal enterprise count alleges taht all of the other violations alleged in the indictment were a part of a continuing series of violations which were conducted in violation of § 848. Hence, the importation and aiding and abetting offenses which do not violate the Double Jeopardy Clause, as well as the possession conspiracy offense which at least in part may violate double jeopardy protection, serve as the basis of the continuing criminal enterprise charge. Stricklin has thus made out a prima facie case that the possession conspiracy and the transactions for which he was convicted in New Mexico and which are alluded to in the Magdalena portions of the original Texas indictment may not be used to show the "in concert" element of the § 848 offense.[5] Since Stricklin has not been subjected to prior jeopardy for the importation conspiracy offense, however, the inclusion of that agreement as part of the foundation of the § 848 charge is not violative of the Fifth Amendment's double jeopardy protection. The attachment of jeopardy to one conspiracy prosecution under § 846 does not insulate a defendant from prosecution for conducting a continuing criminal enterprise in

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[5] The government may, in accord with the exceptions referred to in *Brown v. Ohio,* rebut this presumption of a limited double jeopardy violation in the continuing criminal enterprise prosecution if it is shown on remand that the additional facts necessary to sustain the § 848 charge had not occurred at the time of the New Mexico indictment or had not been discovered despite the exercise of due diligence.

violation of § 848 if the government has evidence of a separate conspiracy with which to satisfy the "in concert" element of § 848. Just as a defendant may be involved in more than one conspiracy over a period of time, he might also be the conductor of more than one continuing criminal enterprise.

C. The Consequences of Stricklin's Nonfrivolous Double Jeopardy Claim

We have found that Stricklin brought forth a nonfrivolous prima facie claim of double jeopardy with regard to at least that part of the possession conspiracy count in the original Texas indictment relating to the Magdalena episode and with regard to that portion of the continuing criminal enterprise charge which refers to the Magdalena episode and agreement as evidence of the "in concert" element of the crime. We realize that neither the District Court, the government, nor the defendant was aware at the time of the double jeopardy hearing that the burden of proof to show there was no former jeopardy is on the government once the defendant has made a nonfrivolous showing of double jeopardy. The inference that the burden of persuasion in such a situation remains on the defendant could be drawn from earlier Fifth Circuit cases. *See United States v. Parker,* 582 F.2d 953, 954 n. 2 (5th Cir. 1978), *citing Rothaus v. United States,* 319 F.2d 528, 529 (5th Cir. 1963) *and Reid v. United States,* 177 F.2d 743, 745 (5th Cir. 1949); *United States v. Inmon,* 568 F.2d 326, 331 (3d Cir. 1977). *Parker* and *Inmon* recognized, however, that *Rothaus* and *Reid,* on which the inference is based, were decided before *Abney.* As such, they are not binding authority on the issue of where the burden of persuasion lies in an appealable pretrial determination of a double jeopardy claim. *Abney's* requirement that the double jeopardy issue be resolved *before* trial demands that new considerations become controlling and the burden is thus shifted. The records were fully developed when *post*-trial appeals of double jeopardy claims were the rule prior to *Abney,* and the defendant could carry the burden of proving double jeopardy without

unreasonable strain. To subject the defendant to that burden before the records are developed at trial, however, would be unreasonable, especially when the government has exclusive access to some of the possibly determinative materials at that time. For that reason, as well as the others discussed in part II of this opinion, we assign the burden of persuasion in a pretrial double jeopardy hearing to the government upon the defendant's making a prima facie showing of prior jeopardy. However, because the parties as well as the District Court in this case were not apprised of the government's burden prior to our holding today,[6] we remand for another hearing on those charges which were shown by the defendant to be prima facie violative of the Fifth Amendment, so that the government has the opportunity to carry its burden and the District Court has the opportunity to apply the proper standards in resolving the defendant's double jeopardy claims.

Assuming that Stricklin makes the speedy trial argument referred to in part I of this opinion, the District Court will also be faced on remand with reevaluation of the charges in the Tennessee indictment as compared with those in the Texas indictment. The District Court's task on remand, then, is to examine the Tennessee and New Mexico indictments and determine whether or not, in the trial on either one, he, as the presiding trial judge, would have permitted the prosecution to prove the matters now alleged in the Texas indictment. If he would have admitted evidence of those allegations, then the previous indictments bar the offending charges in the Texas indictment. This approach is in accord with the "same evidence" test of whether proof of the matter set out in a second indictment is admissible as evidence under the first indictment and, if it is, whether a conviction could have been properly sustained on such

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[6] Nor did the parties or the Court have the benefit of the Third Circuit's analysis in *Inmon,* for that case was decided on November 28, 1977, some three months after Stricklin's pre-trial hearing.

evidence. *See United States v. Marable,* 578 F.2d at 153. We recognized in *Marable* that the essence of a double jeopardy determination in a conspiracy case is whether there was more than one agreement, *id.,* but continued use of the "same evidence" test in cases such as this one may be valuable in reaching that determination.

AFFIRMED in part; REVERSED in part; and REMANDED.